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A Public Use for the Dirty Side of Economic Development: Finding Common Ground Between Kelo and Hathcock for Collateral Takings in Brownfield Redevelopment

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A Public Use for the Dirty Side of Economic Development: Finding Common Ground Between *Kelo* and *Hathcock* for Collateral Takings in Brownfield Redevelopment

Consider a parcel of land, idle for some years because of certain barriers to redevelopment created by real or perceived environmental contamination, a "brownfield" site.[1] Surrounding this site are several other parcels of land that are uncontaminated and unhindered except for the effects of proximity to the contaminated parcel. The private market has not addressed the redevelopment of the contaminated parcel partially because any use to which it might be put could not recover the costs of remediating the site. However, by combining that parcel with the adjacent parcels, the costs of remediation could be absorbed by a larger project or mitigated by effective site planning. For instance, the additional land would allow the "dirtiest" part of the site to be capped with something like a parking lot rather than excavated for a building because the building, requiring a higher remediation, could be placed elsewhere on the site.[2]

Thus taking of otherwise sound property adjacent to the contaminated parcel facilitates the return of that contaminated property to active use. In addition, the redevelopment of the site removes or mitigates the public health issues created by contaminated land. The redevelopment of a site like this would be a reasonable economic development initiative in many American

1. *See* Small Business Liability Relief and Brownfields Revitalization Act, 42 U.S.C. § 9601(39) (2005).

2. *See* Deborah A. Lange & Sue McNeil, *Brownfield Development: Tools for Stewardship*, 130 J. URB. PLAN. & DEV. 109, 110 (2004) (studies show one of the characteristics of effective brownfield redevelopment is the presence of landscaped/green areas).

cities.

However, the reaction in many states to the Supreme Court's decision in *Kelo v. City of New London*[3] may prohibit this strategy. The *Kelo* decision raised popular concern that government could now take one's property and give it to another private party so long as that party's use generates more taxes or creates jobs in the name of economic development. Justice O'Connor's dissent struck a popular chord when she argued that "[n]othing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."[4] Fearing such rampant abuse of eminent domain, many state legislatures proposed various statutes to limit the exercise of eminent domain and in some cases to outright exclude economic development as a valid public purpose.[5] The states have the power to establish the extent to which economic development may be a valid public purpose for the exercise of eminent domain.[6] The concern is that the state power to do away with this public purpose may hurt rather than help eliminate brownfields.

Before barring economic development as a valid public purpose, states should pause and consider what economic development might encompass. Particular attention should be paid to the many economic development initiatives predicated on the redevelopment of environmentally contaminated lands. Within the realm of economic development, the redevelopment of contaminated lands constitutes a valid public purpose under more traditional public use theories. For example, theories supporting

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3. 125 S. Ct. 2655 (2005).

4. *Id.* at 2676.

5. *See* 2005 Ala. Adv. Legis. Serv. 313 (LexisNexis); Assem. B. 590, 2005 Gen. Assem., 2005-06 Reg. Sess. (Cal. 2005); S.J. Res. 20, 2005 Leg., 2006 Reg. Sess. (Fla. 2006); H.B. 4091, 94th Gen. Assem., 2005 Reg. Sess. (Ill. 2005); S.B. 29, 2005 Gen. Assem., 2006 Reg. Sess. (Ky. 2005); H.B. 123, 84th Leg., 2005 1st Spec. Sess. (Minn. 2005); H.B. 2029, 2005 Gen. Assem., 2005 Reg. Sess. (Pa. 2005); H.B. 2426, 104th Gen. Assem., 2005 Reg. Sess. (Tenn. 2005); Texas Government Code Ann. § 2206.001 (2005); S. Con. Res. 402, 77th Leg., 2005 Reg. Sess. (W. Va. 2005). For a listing of State proposals to prohibit *Kelo* type takings, banning economic development as a public purpose, see CastleCoalition.org, Legislative Center, http://www.castlecoalition.org/legislation/index.html (last visited December 7, 2006); For various poll results illustrating the *Kelo* backlash, see CastleCoalition.com, *The Polls are In*, http://www.castlecoalition.org/resources/kelo_polls.html (last visited Nov. 19, 2006).

6. *See Kelo*, 125 S. Ct. at 2668.

the use of eminent domain for the removal of blight can be applied to the taking of private contaminated property. But this constitutes only a part of the economic development scenario. Where blight or health risk is generally accepted as a basis for taking the contaminated parcel itself,[7] the redevelopment of contaminated property may require broader takings to achieve that end.[8]

This Comment evaluates the extent to which existing legal theories regarding public use support the exercise of eminent domain to foster the redevelopment of brownfield sites. *Kelo* left unanswered what exactly constitutes municipal economic development. This Comment seeks to illustrate that brownfields redevelopment is at least one part of that concept. Part I provides a brief history and description of the eminent domain power, its constitutional function, and how the doctrine of public use has evolved from a narrow reading to a significantly broader modern interpretation. Part II is a brief primer in brownfield redevelopment, summarizing the common challenges faced in redeveloping these properties. This section will outline how uncertain liability, high clean-up costs, and lender perception create barriers to redevelopment. Part III applies the current theories of public use to the taking of property to foster the redevelopment of brownfield sites to return these contaminated lands to active use and mitigate a public health threat. This section compares the broad view of public use adopted by the U.S. Supreme Court and the narrower view exemplified by the Michigan Supreme Court's decision in *County of Wayne v. Hathcock*.[9] Part IV concludes by proposing a path for state legislation for the future use of eminent domain in this realm of economic development. That path recognizes a significant need for such development tools, particularly in aging urbanized areas where re-development, as opposed to new development is the only

7. *See* Private Property Rights Act of 2005, H.R. 4128, 109th Cong. (1st Sess. 2005). A contaminated parcel of land is exempted from the definition of economic development in the version passed by the House in response to the *Kelo* decision.

8. The principles of urban planning and the basic responsibilities of government that form the basis for the determination that additional land may be required, are concepts also endorsed by the Supreme Court it the *Kelo* decision. *See Kelo*, 125 S. Ct. at 2668.

9. 684 N.W.2d 765 (Mich. 2004).

option.

I. THE EMINENT DOMAIN POWER

A. *Historical Roots*

The term "Eminent Domain" was first coined in the writings of Hugo Grotius.[10] Grotius recognized a power of the state to take property for the benefit of the community.[11] His basic rationale was that the good of the many outweighed the good of the few. However, that reasoning extended beyond mere necessity to the fundamental character of government.[12] The fundamental theory on which the power of eminent domain is predicated has changed since Grotius' writing, but the existence of the power has always been recognized.[13] Although never explicitly mentioned in the main body of the Constitution, the power is recognized by implication in the Fifth Amendment's protections against its use, "nor shall private property be taken for public use, without just compensation."[14] The debate, however, is not over the implied existence of the power, but the limits that may or may not be imposed on the power. Although the limits imposed by the various other elements of the Takings Clause have been the subject of much debate, this Comment is concerned with the public use component.

B. *The Public Use Journey*

There is some debate over whether the words "public use" in the Fifth Amendment are simply descriptive rather than

10. PHILIP NICHOLS, NICHOLS ON EMINENT DOMAIN 1-15 (Julius L. Sackman ed., 2005) ("[T]he property of subjects is under the eminent domain of the state, so that the state or he who acts for it may use and even alienate and destroy such property . . . for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way.").

11. *Id.*

12. *Id.*

13. *See id.* at 117-22 (originally considered a reserved property right, the power is now accepted as an inherent trait of sovereignty). *See also* BLACK'S LAW DICTIONARY 562 (8th ed. 2004) (defining eminent domain as "the inherent power of a governmental entity to take privately owned property, esp. land, and convert it to public use, subject to reasonable compensation for the taking.").

14. U.S. CONST. amend. V.

limiting.[15] On one hand, those subscribing to a descriptive interpretation believe the phrase merely outlines which takings require compensation.[16] On the other hand, those accepting the limiting view believe property may only be taken when the property is literally used by the public.[17] Years of judicial interpretation of public use have imposed limits on the exercise of eminent domain and in fact no court has adopted the descriptive interpretation.[18] Thus, assuming that the phrase imposes some limitation, we turn to what that limitation might be and the Supreme Court's interpretation of what constitutes "public use."[19]

From its very beginnings the Supreme Court has held that the taking of property from A to give to B is an abuse of eminent domain.[20] Still today, the taking of private property from one private party and directly transferring it to another private party seems to fail the public use requirement of the Fifth Amendment.[21] "A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void."[22] However, what, if anything, is *purely* private?

Certainly a *purely* public use poses no problem. At the center of its vision of public use, the Supreme Court has recognized that land taken for use by the public satisfies the Fifth Amendment.[23]

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15. *See* Matthew P. Harrington, *"Public Use" and the Original Understanding of the So-Called "Takings Clause"*, 53 HASTINGS L.J. 1245, 1246-48 (2002).

16. *Id.* at 1249.

17. *See* Thomas W. Merril, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 71 (1986).

18. *See* Harrington, *supra* note 15, at 1254-56.

19. *See id.*

20. Eight years after it first assembled, the Supreme Court said in *Calder v. Bull*: "a law that takes property from A, and gives it to B: It is against all reason and justice, for a people to entrust a Legislature with SUCH powers." 3 U.S. 386, 388 (1798). Over the past 200 years the Court has reiterated this point many times, most recently in the *Kelo* decision.

21. Although hedging its statement, the Court referred to such transfers as "aberrations" and that "such an unusual exercise of government power would certainly raise a suspicion that private purpose was afoot." Kelo v. City of New London, 125 S. Ct. 2655, 2667 (2005).

22. Haw. Hous. Auth. v. Midkiff, 467 U.S. 229, 245 (1984).

23. *See* Rindge Co. v. County of Los Angeles, 262 U.S. 700, 706 (1923) (stating "[t]hat a taking of property for a highway is a taking for public use has been universally recognized from time immemorial").

In *Rindge Co. v. County of Los Angeles*, the local government sought to take private ranch lands to construct a road.[24] The Court held that building a road to connect to a highway for use by the traveling public was a valid public use.[25] The construction or expansion of a roadway is a common and valid public purpose where it is used by the general public.

As the nation continued to develop, new circumstances required expansion of the concept beyond pure public use. Public use was found in the taking of land for transfer to private railroad companies, common carriers, and utilities.[26] The basic rationale for these transfers was that the public would use the products or services of common carriers or utilities and that it was more efficient that the land be held in private hands.[27]

The scope of "public use" broadened again from the direct public use of services to a direct public benefit. In *Berman v. Parker*, the Supreme Court upheld the taking by eminent domain of private commercial land for transfer to another private party.[28] The local government intended to redevelop the property pursuant to a comprehensive plan prepared by the local redevelopment agency.[29] Although the overall plan was intended to remedy the substandard housing, lack of infrastructure, and deteriorating conditions in the area, the plaintiff's particular property was not "blighted."[30] Surveys conducted as part of the planning process

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24. *Id.*

25. *Id.* at 708. This case also introduces the Court's emerging view of a broader "public use" doctrine. Citing the example of public parks, the Court noted that the road would provide a scenic route along the shore. Thus, in addition to a route through the County, the condemnation was a matter of public health, recreation and enjoyment. *Id.* at 707-08.

26. *See* Secombe v. R.R. Co., 90 U.S. 108, 118 (1874) ("[T]he taking of private property in order that a railroad may be constructed, is a public necessity.").

27. *Id.* at 111.

28. 348 U.S. 26 (1954).

29. *Id.*

30. *See id.* at 33. Blight is:

> a condition of property or the uses of property in parts of a city, town, or neighborhood that are detrimental to the physical, social, and/or economic well-being of a community. It can include abandoned buildings or those severely neglected by their owners, vacant lots full of rubble and garbage, or dangerous and/or illegal uses such as crack houses.

http://www.urbanplan.org/UP_Glossary/UP_Glossary.html#b. (last visited

showed that "64.3% of the dwellings were beyond repair, . . . 29.3% lacked electricity, . . . 83.8% lacked central heating."[31]

The Court approved the taking of the plaintiff's non-blighted property even though it did not contribute to the deteriorated conditions.[32] It further held that the broad police powers of the state make the general welfare of its citizens a proper objective of the legislature.[33] Thus, the power of eminent domain was merely a means to achieving that objective of protecting the health and general welfare of the community.[34] This means-end rationale justified implementing the comprehensive redevelopment plan by which non-blighted property is taken along with blighted.[35] In *Berman*, "the experts concluded that if the community were to be healthy, if it were not to revert again to a blighted or slum area, as though possessed of a congenital disease, the area must be planned as a whole."[36]

Thirty years after *Berman v. Parker*, the Court reaffirmed its broad interpretation of public use in *Hawaii Housing Authority v. Midkiff*.[37] The Court upheld a Hawaiian Act designed to remedy a feudalistic system of land ownership by redistributing the land held by a few private parties to the private tenants that had been leasing.[38] The legislature had found the state's antiquated system of land ownership was disturbing the general peace and welfare of its citizens, raising the price of land and interfering with the residential fee simple market.[39] The Court held that the goals of the Act were "within the bounds of the State's police powers and that the means the legislature had chosen to serve those goals were not arbitrary, capricious, or selected in bad faith."[40]

The fact that the property was to be taken from one group of private owners and transferred to another was not fatal to the act.

Sept. 15, 2006).

31. *Berman*, 348 U.S. at 28-30.
32. *See id.* at 34.
33. *See id.* at 32-33.
34. *See id.*
35. *See id.* at 34-35.
36. *Id.* at 34.
37. 467 U.S. 229 (1984).
38. *See id.* at 232-33.
39. *Id.* at 232.
40. *Id.* at 235.

A legitimate public purpose for the action existed.[41] The Court held that "the 'public use' requirement is thus coterminous with the scope of a sovereign's police powers."[42] The Court focused on the purpose of the action itself and not the details of the transaction.[43] If the legislature's purpose for the action fell within the scope of its police power then the Court would defer to that determination as serving a public use.[44]

C. *Economic Development as a Public Purpose*

1. *A Broad View of Public Use*

In *Kelo v. New London,* a divided U.S. Supreme Court upheld an eminent domain taking for economic development purposes. The taking was part of a comprehensive plan to revitalize a particular area of the city designed to bring increased tax revenue and new jobs.[45] In 1990 the state of Connecticut had designated New London a "distressed municipality."[46] In the decade that followed, the City experienced its lowest population since the 1920's, an unemployment rate that was double that of the State, and the closing of the Naval Undersea Warfare Center that had employed 1,500 people.[47] To address the city's general decline, a partnership between the state and local officials targeted the Fort Trumbull area of the city for economic revitalization.[48]

The City reactivated the New London Development Corporation (NLDC) to prepare and implement a revitalization plan for the area.[49] Following a two-year planning process the state and local governments approved a plan to redevelop ninety acres of the Fort Trumbull area.[50] The area consisted of 115 privately owned properties of land that would be reassembled into

41. *See id.* at 243-44.
42. *Id.* at 240; *see also* Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 422 (1992).
43. *Id.* at 244. ("It is only the taking's purpose and not its mechanics, that must pass scrutiny under the Public Use Clause.").
44. *Id.*
45. Kelo v. City of New London, 125 S. Ct. 2655, 2658 (2005).
46. *Id.*
47. *Id.*
48. *See id.* at 2659.
49. *Id.*
50. *Id.*

seven development parcels for redevelopment into various uses such as a conference hotel at the center of a "small urban village," an urban neighborhood, research and development office space, and supporting uses such as parking.[51]

The plan was intended to create jobs, increase tax revenue, make the city more attractive, create recreational opportunities on the waterfront, and build momentum for other revitalization efforts.[52] In particular, the plan sought to capitalize on Pfizer Inc.'s commitment to build a new research facility on a site adjacent to the plan area.[53] Several residents in the plan area challenged the taking of their individual properties for the purpose of economic development as an invalid public use. They argued that their properties were not blighted and were only targeted for acquisition because they were located within the planning area.[54]

In a 5-4 majority, the Court reiterated its broad interpretation of public use and its policy of deference to the determinations of the state legislatures articulated in *Berman* and *Midkiff*. The Court held that the local government's determination that the area was so distressed as to justify public action for economic rejuvenation was entitled to deference as a valid public use.[55] The Court highlighted the City's efforts in urban planning to coordinate various land uses to "form a whole greater than the sum of the parts."[56] Based on the plan's comprehensive nature and the thorough process involved in its creation, the Court reasoned that the takings must be resolved as a whole rather than piecemeal.[57] The Court held that "economic development is a traditional and long accepted function of government."[58]

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51. *Id.*
52. *Id.*
53. *Id.* Note also that "the trial judge and all members of the Supreme Court of Connecticut agreed that there was no evidence of an illegitimate purpose in this case." *Id.* at 2661. Leveraging the Pfizer site is a strategic planning decision consistent with modern sustainable planning theories for capturing efficiencies through collocation of similar or complementary uses.
54. *See id.* at 2660.
55. *See id.* at 2665.
56. *Id.*
57. *See id.*
58. *Id.*

2. *A Narrow View of Public Use*

Although *Kelo* has determined that economic development may constitute a public use for the exercise of eminent domain, it also held that the states have the authority to craft their own definitions of public use.[59] Today, many states are running with that option. Alabama was the first state to pass legislation after *Kelo*.[60] Just a little more than one month after the Court issued its opinion, Alabama barred the use of eminent domain for private economic development or to enhance the tax base.[61] Texas has also enacted legislation prohibiting the use of eminent domain for general economic development purposes.[62]

In addition to state legislatures defining public use through statutes, state courts are also playing a role. Interestingly, one year before the United States Supreme Court issued its opinion in *Kelo*, the court that is often attributed with opening the door for economic development as a valid public use set new limits on eminent domain for that purpose.[63] In 1981, the Michigan Supreme Court, had issued the landmark decision in *Poletown Neighborhood Council v. Detroit*.[64] In allowing the city of Detroit to take land for a new General Motors facility the state supreme court established economic development as a valid public use for the exercise of eminent domain.[65]

The taking in *Poletown* involved the acquisition of land by the City of Detroit for transfer to General Motors so that it could construct a new assembly plant.[66] The Michigan Supreme Court held that the taking of private property by eminent domain for transfer to another private party for purposes of development

59. *Id.* at 2668 ("We emphasize that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.").

60. *See* 2005 Ala. Adv. Legis. Serv. 313 (LexisNexis); *see also* Institute for Justice, *With Governor's Signature Today, Alabama Will Become First State To Curb Eminent Domain Abuse After Kelo*, Aug. 3, 2005, http://www.ij.org/private_property/castle/8_3_05pr.html.

61. *Id.*

62. *See* TEXAS GOV'T CODE ANN. § 2206.001 (Vernon 2005).

63. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981), *overruled by* County of Wayne v. Hathcock, 684 N.W.2d 765 (Mich. 2004).

64. 304 N.W.2d 455.

65. *Id.* at 459-60.

66. *Id.* at 457.

satisfied the public use requirement of the Michigan Constitution where the significance to the public was demonstrated and "the benefit to a private interest [was] merely incidental."[67] In its reasoning, the court equated the power of eminent domain with the power to regulate land uses through zoning and with nuisance prevention, concepts falling within the police power of the state.[68] Thus the *Poletown* court had adopted the broader interpretation of public use later endorsed by the U.S. Supreme Court in *Kelo*.

Nearly twenty-five years later, the Michigan Supreme Court reversed the decision of *Poletown* when it decided *Hathcock*. In accordance with the dissenting opinion in *Poletown*, *Hathcock* held that taking private property by eminent domain and transferring to another private party is only appropriate where (1) public necessity of the extreme sort requires collective action; or (2) the property remains subject to public oversight after being transferred to a private party; or (3) the property is selected because of 'facts of independent public significance,' as opposed to the interests of the private party to which the property is transferred.[69]

In *Hathcock*, Wayne County had proposed to use its power of eminent domain to condemn property for the construction of a business and technology park "to reinvigorate the struggling economy."[70] There was no argument that the project would in fact benefit the public by bringing new jobs, increasing tax revenue, and attracting investment to the area.[71] However, public benefit is only one necessary condition; if public benefit alone was the sole basis for taking private property there would be little, if any, limit to the eminent domain power.[72] The court held that to justify the

67. *Id.* at 459.

68. *Id.* ("Eminent domain is an inherent power of the sovereign of the same nature as, albeit more severe than, the power to regulate the use of land through zoning or the prohibition of public nuisances.").

69. *Hathcock*, 684 N.W.2d at 781.

70. *Id.* at 769-70.

71. *Id.* at 778.

72. *Id.* at 786. The court reasoned:

> To justify the exercise of eminent domain solely on the basis of the fact that the use of that property by a private entity seeking its own profit might contribute to the economy's health is to render impotent our constitutional limitations on the government's power of eminent domain. Poletown's "economic benefit" rationale would validate practically *any* exercise of eminent domain on behalf of a private entity.

taking of private property by eminent domain to be transferred to another private party, the taking would also have to entail one of the following elements:

Public Necessity:

The public necessity required to justify condemnation of private land for transfer to a private party envisions a scenario where the *existence* of the transferee's enterprise depends on using land that can only be assembled by the government.[73] Referring to such parties as "instrumentalities of commerce," the frequent example is the railroad, where only the government's use of eminent domain can avoid the pitfalls of the holdout that could derail the construction of the line entirely.[74]

Post-Transfer Accountability to the Public:

Where the private transferee remains accountable to the public for its use of the property, the public use requirement may be satisfied.[75] The key test according to the Michigan Court is whether the use of the land by the private transferee is subject to "some" enforceable measure of control by the public.[76] The basic

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> After all, if one's ownership of private property is forever subject to the government's determination that another private party would put one's land to better use, then the ownership of real property is perpetually threatened by the expansion plans of any large discount retailer, "megastore," or the like.

Id. (emphasis in original).

73. *Id.* at 781 ("The existence of eminent domain for private corporations has been limited to those enterprises generating public benefits whose very *existence* depends on the use of land that can be assembled only by the coordination central government alone is capable of achieving.") (citing Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 304, 477-81 (Mich. 1981) (Ryan, J., dissenting)) (emphasis in original).

74. *Id.*

75. *See id.* at 782. Note also that in *Kelo* the proposed sales to private parties included lease and sale guarantees for development consistent with the plan. *See* 125 S. Ct. at 2666 n.15.

76. *See id.* The court cited its previous opinion in *Lakehead Pipeline Co. v. Dehn*, 64 N.W.2d 903 (Mich. 1954), as an example of sufficient control where the plaintiff has "pledged itself to transport in intrastate commerce," that plaintiff's pipeline was used pursuant to directions from the Michigan Public Service Commission, and that the state would be able to enforce those obligations, should the need arise. *Id.*

rationale is to preserve the public use that justifies the taking.[77] This element also seems to seek a device to create a stronger public element than would otherwise exist, i.e., a railroad's title to the land contingent on the land's continuing use for a railroad.[78]

Independent Public Significance:

The court also discussed the alternative requirement that the condemned land have been selected for reasons independent of the private transferee's interests.[79] The clearest example is slum clearance where the land to be condemned is selected because of the location of blight.[80] Likewise, public utilities and railroads which require land based on the location of their respective service areas satisfy this criterion.[81] The land in those cases is identified by the public's interest in transportation or utility services across the land rather than the private interests of the company.[82] Other criteria such as the location of population centers and geographic barriers like rivers that determine what land must be taken would constitute independent factors.[83]

The court in *Hathcock* held the county's development project contained none of the validating elements of public use for such a transfer to private parties.[84] The prolific "existence" of similar uses that had formed without collective public action was ample evidence that the exercise of eminent domain was not necessary.[85] Furthermore, without any enforceable instrument to guarantee that the businesses that would occupy the condemned properties would remain there as a continuing benefit to the local economy, the County could not establish sufficient public accountability.[86] Finally, the only public benefits the County could demonstrate resulted from the private redevelopment rather than the act of

77. *See Poletown*, 304 N.W.2d at 479-80.
78. *Id.*
79. *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 783 (Mich. 2004); *see also Poletown*, 304 N.W.2d at 480 (Ryan, J., dissenting).
80. *Poletown*, 304 N.W.2d at 480 (Ryan, J., dissenting).
81. *Id.*
82. *Id.*
83. *Id.*
84. 684 N.W.2d at 783.
85. *Id.*
86. *Id.* at 784.

condemnation.[87] Thus no facts of independent public significance were presented.[88]

Because of this narrow interpretation of public use and its overruling of *Poletown*, the decision in *Hathcock* may be considered the antithesis to the *Kelo* opinion. However, the *Hathcock* elements may be present in the particular realm of economic development involving brownfields.[89] Thus both *Kelo* and *Hathcock* could provide a basis for the application of the eminent domain power in brownfields redevelopment.

II. BROWNFIELD ECONOMIC DEVELOPMENT

Brownfields are "real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant."[90] This broad definition offers only slightly more guidance than the public use clause of the Constitution. There are, however, a few broad parameters; one parameter is the degree of contamination. If the land is so contaminated as to justify its listing on the National Priorities List (Superfund) or a State Priorities List it is not a brownfield site under the definition of the Brownfields Revitalization and Environmental Restoration Act (BRERA).[91] Another parameter is the land use; the site must be a commercial or industrial property.[92] The General Accounting Office (GAO) estimates that there are over 400,000 brownfield sites nationwide.[93] One Boston neighborhood, located around Dudley Street, covers just one and a half square miles but has within its boundaries 54 state-identified hazardous waste sites.[94]

This Comment evaluates the utility of eminent domain to acquire the land surrounding brownfield sites.[95] The definition

87. *Id.*
88. *Id.*
89. *See infra* Part III.
90. *See* Brownfield Revitalization Act, *supra* note 1.
91. *Id.*
92. For example significant lead paint as might be found at a residential home may fall within the type of health risk posed by brownfield sites but is technically not eligible for such classification.
93. U.S. GEN. ACCOUNTING OFFICE, COMMUNITY DEVELOPMENT: REUSE OF URBAN INDUSTRIAL SITES, GAO/RCED-95-172 (1995).
94. *Id.*
95. This Comment is addressed to brownfield sites as opposed to Superfund sites. Superfund sites, regulated by the Comprehensive

leaves room for a large variety of potential sites ranging in possibilities between a Superfund site[96] at one end and at the other end a clean site burdened only with the stigma of contamination because of prior industrial uses. As a frame of reference, consider a real site in the downtown area of a mid-sized New England town, approximately half an acre in size, surrounded by a hodge-podge of small office buildings and retail shops, single and multi-family homes, and auto services. A Phase II Site Assessment[97] reports a number of various contaminants including an unidentified "purple ooze." The particular characteristics that might constitute a brownfield vary greatly, but for the purposes of this Comment those variable characteristics are less important than the nature of the challenges involved in redeveloping such sites.

The challenges to redeveloping a brownfield site come in several forms. For example, because current property owners cannot completely absolve themselves of responsibility for cleanup by selling to a developer, many contaminated sites remain

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Environmental Response, Compensation, and Liability Act (CERCLA), are a higher order of magnitude than brownfield sites. 42 U.S.C. § 9601 (2000). They pose a greater and more immediate health and safety risk. The severe degree of contamination of Superfund sites greatly restricts either the allowable redevelopment uses or the time period in which any redevelopment might be achievable (i.e., decades) or both. Thus the practical application of eminent domain in that context is tenuous. The lower level of contamination at brownfield sites offers a greater potential of redevelopment making the necessity of public intervention a closer question. That reality, coupled with the abundant existence of such sites, makes them a more practical focus of this discussion.

96. *See id.*

97. A Phase II Assessment is generally the second stage of site evaluation requiring site access, soil boring and chemical analysis, it does not involve the detailed remediation plans and cost analysis of Phase III but is considerably more detailed than a Phase I Assessment. A Phase I Assessment is primarily a records search and analysis of prior uses. *See* Public Building Services, U.S. General Services Administration, *The Site Selection Guide,* 102-05 (2005), *available at* http://www.gsa.gov/siteselection; *see also,* ASTM E1527-05, *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process,* ASTM international, document summary *available at* http://www.astm.org; ASTM E1903-97, *Standard Practice for Environmental Site Assessments: Phase II Environmental Site Assessment Process,* ASTM international, document summary *available at* http://www.astm.org.

stagnant.[98] Also, the threat of becoming entangled in legal battles with prior owners and uncertain future liability deters developers from these sites.[99]

Many developers know there is often a high price for executing a cleanup, but it is more difficult to determine the precise cost of redevelopment due to uncertain future liabilities. For example, it is difficult to say how much it might cost to remove the "purple ooze" if it cannot be identified, let alone accurately quantified prior to acquisition or development.[100] Although interpretations to the All Appropriate Inquiry (AAI) standard[101] may relieve some of that concern, the high price of investigating brownfield sites remains a significant barrier to a private market that often has multiple "greenfield" alternatives available. Additionally, the barriers to redeveloping contaminated land, often in urban centers, have had the negative consequence of overdevelopment in suburban and rural areas.[102]

Furthermore, as much as the public would generally support the remediation of contaminated land, there is usually significant

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98. Todd S. Davis, *Defining the Brownfields Problem*, *in* BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTIES 9 (Todd S. Davis ed., 2d ed. 2002) [hereinafter BROWNFIELDS].

99. *Id.*

100. *Id. See* U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, REDEVELOPING BROWNFIELDS: HOW STATES AND LOCALITIES USE CDGB FUNDS 6 (Oct. 1998) ("[T]he typical cost of cleaning up a brownfield, based on a study of State cleanup programs in the early 1990s, is thought to be $400,000."), *available at* http://www.huduser.org/publications/econdev/ redevelo.html.

101. The All Appropriate Inquiry (AAI) standard is a provision in the Small Business Liability Relief and Revitalization Act providing liability relief to certain prospective land buyers who conduct adequate and appropriate due diligence. *See* 42 U.S.C. § 9601(39) (2005). The lack of clarity regarding what satisfied the AAI standard created significant risk of future liability for prospective brownfield developers. In lieu of congressional assistance clarifying the definition, EPA has attempted to provide guidance through interim standards. *See* ASTM E1527-00, *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process*, ASTM International, document summary *available at* http://www.astm.org. The All Appropriate Inquiry Standard was finalized and the final rule was published in a NOFA on Nov. 1, 2005. *See* 40 C.F.R. § 312 (2005).

102. *See* Davis, *supra* note 98, at 12-13; *see also* EPA, *Smart Growth in Brownfield Communities*, http://www.epa.gov/smartgrowth/brownfields.htm (last visited Sept. 15, 2006) [hereinafter EPA] (quoting President George W. Bush, "one of the best ways to arrest urban sprawl is to develop brownfields").

conflict on how the land should be redeveloped. The community might be seeking a passive or traditionally cleaner use that requires a higher level of remediation and offers a lower return than what a developer might require. Even if the developer might be satisfied with a prospective return, access to capital for redevelopment is also hindered by the presence or potential presence of contamination. Commercial lenders are significantly less likely to participate in a transaction involving contaminated land for fear of potential liability for remediation costs and the lower value of contaminated land as collateral upon default.[103]

With the passage of BRERA in 2002, Congress took a significant step toward tackling the challenges of brownfields redevelopment.[104] However, the funding incentives and liability reforms are limited. Brownfield redevelopment remains one of the most challenging municipal development issues.[105] The various federal and state financing programs made available to assist brownfield redevelopment are evidence that the private market is not addressing the redevelopment of these sites and that public intervention is necessary.[106]

Furthermore, when considering the disproportionate distribution of contaminated lands in minority and poor communities, the need for public intervention becomes more apparent.[107] This is where eminent domain may play a role in

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103. Davis, *supra* note 100, at 11; *see also* Charles Bartsch & Barbara Wells, *Financing Strategies for Brownfield Cleanup and Redevelopment* 7 (Northeast-Midwest Inst. 2003), *available at* http://www.nemw.org/BF financingredev.pdf.

104. David B. Hird, *The Brownfields Revitalization and Environmental Restoration Act*, *in* BROWNFIELDS, *supra* note 98, at xxv.

105. *See generally* 4 U.S. CONFERENCE OF MAYORS, RECYCLING AMERICA'S LAND: A NATIONAL REPORT ON BROWNFIELDS REDEVELOPMENT (2003), *available at* http://www.usmayors.org/uscm/brownfields/RecycleAmerica2003.pdf [hereinafter U.S. CONFERENCE OF MAYORS].

106. Various federal agencies have developed programs to identify Brownfield redevelopment. For example, HUD has established the Brownfields Economic Development Initiative (BEDI) to complement its Section 108 Loan program; EPA helps capitalize Brownfields Revolving Loan Funds, and various tax credits are available. *See* Charles Bartsch, *Federal Family of Funds: What Can Be Tapped for Brownfield Needs?* (Northeast-Midwest Inst. 2005), http://www.nemw.org/fed%20family%20of%20 brownfield%20funds.ppt.

107. *See* D. Farber & E. Krieg, *Unequal Exposure to Ecological Hazards: Environmental Injustices in the Commonwealth of Massachusetts*

mitigating the detrimental effects of brownfield sites in poor and minority communities. As Justice Thomas pointed out in his dissent in *Kelo*, historically the exercise of eminent domain for economic development purposes has had a disproportionate effect on minority communities.[108] The majority of families displaced by urban renewal initiatives have been non-white with low incomes.[109] In fact, the *Poletown* neighborhood was predominantly "lower-income and elderly."[110]

The other side to a brownfield site is the effect of contaminated land on the health, safety, and general welfare of the community. Many communities consider brownfield sites largely from a development perspective focusing on the effects of contaminated land on private market interest and the land as a commodity in the community that should be utilized, preferably to its highest and best use. However, the mere presence of contaminants poses a basic risk of exposure to potentially harmful substances. In addition the potential of pollutant migration may threaten adjacent properties and groundwater supplies. Furthermore, as underutilized and abandoned land, many sites are used as dumping grounds raising additional concerns for public health.[111]

Although collateral takings will not relieve a redeveloper of liability, the risks when measured against a larger project may be more acceptable. Like any real estate development, when deciding to undertake a brownfield project, a developer will determine the probable rate of return. However, the inherent uncertainties in a brownfield site make this determination more complicated. Thus any factors that might reduce the uncertainty would reduce one of the typical barriers to such a redevelopment.

(Northeastern Univ. Oct. 12, 2005), *available at* http://www.socant.neu.edu/download/final_unequal_exposure_report_2005.pdf.

108. *See* 125 S. Ct. 2655, 2687 (2005).

109. *Id.*

110. *Id.* (citing J. WYLIE, POLETOWN: COMMUNITY BETRAYED 58 (1989)).

111. *See* Davis, *supra* note 98, at 7. For examples of exposure pathways and the health risks from contaminated sites visit the ASTDR website. ASTDR, http://www.astdr.gov (last visited Nov. 19, 2006). "People who live near hazardous waste sites may be exposed to PCBs by consuming PCB-contaminated sportfish and game animals, by breathing PCBs in air, or by drinking PCB-contaminated well water." ASTDR.com, Public Health Statement, http://www.atsdr.cdc.gov/toxprofiles/phs17.html (last visited Nov. 19, 2006).

The collateral takings considered here can reduce the uncertainty by providing the opportunity for remediation alternatives through site planning. Should unexpected contamination be found after acquisition the problem could potentially be addressed through less expensive design changes rather then exorbitant removal or clean up costs.

Likewise, the efficiencies that may be captured in such a development may mitigate the high costs of cleanup and investigation of potentially contaminated sites. The greater revenue generating square footage of the larger project obtained with only marginal increases in production costs can mitigate the risks. As the potential return increases the amount of risk a prospective developer is likely to find acceptable increases. Along with the flexibility to accommodate some of the uncertainty as noted above, the collateral takings may have a significant effect on the risk-return calculation.

For the same reasons a developer may be more interested in such a redevelopment, a lender may also be more willing to participate in the venture. This would seem particularly true when not all the land securing the financing is contaminated.[112] The lender's fear of being saddled with contaminated land upon a default could be reduced. Obviously the risk could not be eliminated entirely and if a default occurred prior to any remediation the value of the uncontaminated land might still be diminished. However, where the public action can aid in addressing the barriers to redevelopment that the private market cannot, that risk need not be reduced to zero. In addition, the assembly of land, particularly in accordance with a rational development plan, that can leverage existing infrastructure will also create a site more competitive with available greenfield alternatives.[113]

112. *See generally* Davis, *supra* note 98, at 11 ("[T]he prospect of foreclosing on contaminated collateral in the event of default dampens lender interest in brownfield loans.").

113. *See* B. Robert Amjad & Adam Fishman, *Acquisition Considerations for Brownfields Properties*, *in* BROWNFIELDS, *supra* note 98, at 69-72.

III. BROWNFIELD REDEVELOPMENT – A PUBLIC USE

A. *Simple Blight*

For the last half-century, the acquisition of private property by eminent domain to remove blight has been an accepted public use.[114] Blight is a somewhat ambiguous term, most easily defined by "you will know it when you see it."[115] However, blight is more than just a dilapidated property; the concept extends beyond the condition of a property itself and considers the effects a property has on its surroundings.[116] These effects may come in many forms such as depressed property values or deteriorating structural conditions the underlying characteristic of which is a general resistance to remedy by traditional market forces.[117]

As inherently abandoned and underutilized sites burdened by the presence or perception of environmental contamination, brownfield sites would generally fit a simple blight definition.[118] The nature of a brownfield site deters private market forces from attempting to redevelop the land. The barriers created by the environmental condition thus have the same effect as small parcelization and scattered ownership that often characterize blight and justify its remediation on the basis of the impracticality of private market redevelopment.[119] In addition to their unique environmental issues, brownfield sites often share the physical

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114. *See* Berman v. Parker, 348 U.S. 26, 26 (1954).

115. *See id.* at 33.

116. *See, e.g.*, CAL. HEALTH & SAFETY CODE § 33030 (Deering 2005) Defining a blighted area as:

> [T]he combination of conditions . . . is so prevalent and so substantial that it causes a reduction of, or lack of, proper utilization of the area to such an extent that it constitutes a serious physical and economic burden on the community which cannot reasonably be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment.

Id.

117. *See, e.g.*, MASS. GEN. LAWS ch. 121B, § 1 (2006) (describing the various conditions that constitute a blighted area).

118. *See* OFFICE OF TECHNOLOGY AND ASSESSMENT, STATE OF THE STATES ON BROWNFIELDS: PROGRAMS FOR CLEANUP AND REUSE OF CONTAMINATED SITES, at 4-5 (1995) *available at* http://govinfo.library.unt.edu/ota/Ota_1/DATA/1995/9540.PDF (last visited Jan. 11, 2007).

119. *Id.*

characteristics of blighted property.[120] Moreover, the real potential of pollutant migration to contiguous parcels, the subsequent liabilities, along with the stigma that attaches to contaminated land also have tangible negative impacts on surrounding land.[121]

Eminent domain often functions as a blight removal tool by assembling land to create developable parcels and capture efficiencies. In the same way, eminent domain may foster the redevelopment of a contaminated parcel through collateral takings of contiguous land. This raises a question however about whether a contaminated property always rises to the level of blight. A building that is in disrepair does not always rise to this level.[122] However, there is a significant distinction; a brownfield is defined by an impairment to the land itself. Thus a brownfield will always share the justifications for blight removal that are based on inherent characteristics of the land such as obsolete parcelization and location factors.

In addition, eminent domain may aid in maximizing the health and safety benefits of brownfield remediation. Even when the private sector participates in a brownfield redevelopment it will naturally seek the lowest (cheapest) level of remediation in order to maximize profits.[123] Thus, not surprisingly, the market's interest in brownfield remediation is not synonymous with the public's interest in health and safety. Health and safety is a public purpose falling under the general purview of the police power.[124] The Court has held that the public purpose under the police power is synonymous with public use.[125] Thus where the taking of collateral properties would raise the level of remediation in a site, the marginal increase in health and safety benefits should satisfy the public use requirement of eminent domain. The

120. *See* CHARLES BARTSCH ET AL., COMING CLEAN FOR ECONOMIC DEVELOPMENT: A RESOURCE BOOK ON ENVIRONMENTAL CLEANUP AND ECONOMIC DEVELOPMENT OPPORTUNITIES 8 (Northeast-Midwest Inst. 1996), *available at* http://www.nemw.org/brownfields.

121. *Id.*

122. In *Kelo*, the State had designated the City of New London as a whole as a "distressed municipality," yet there was no argument that the plaintiffs' properties were blighted. *See* 125 S. Ct. at 2658, 2660.

123. *See generally* Charles Bartsch et. al., *supra* note 122, at 7-12.

124. *See* Berman v. Parker, 348 U.S. 26, 26 (1954).

125. *See* Midkiff v. Haw. Hous. Auth., 467 U.S. 229, 240 (1984).

removal of the health and environmental threat by taking the adjacent good land to create value in the larger site significant enough to make the remediation financially feasible is itself a public use.[126]

The alternative to these larger takings would argue for taking the contaminated parcel alone. The uncontaminated land would be acquired by the private market. The whole site would then be redeveloped through public-private partnerships. However, without a guarantee that other parcels could be assembled, willful acquisition of a contaminated parcel places the acquiring party in the chain of responsibility for clean-up without a reasonable means of recovering the cost that must be incurred to put the land to productive use.[127]

B. *Applying the Hathcock Elements in Brownfield Redevelopment*

In addition to the blight analogy, Michigan's interpretation of public use may support collateral takings to aid a brownfield redevelopment. The three elements put forth in *Hathcock* were distilled from Michigan's case law permitting the long accepted transfer of condemned lands to private parties where "'instrumentalities of commerce were involved."[128] *Hathcock* illustrated that not all economic development initiatives would necessarily include any one of those elements.[129] However, even under the *Hathcock* court's narrower interpretation of public use, collateral takings to foster the redevelopment of a contaminated site would include at least one, if not all, of the three required elements.

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126. Whether the city undertakes the remediation itself or transfers the property to a private party to accomplish the same remediation is merely a choice of means to the same end rather than the purpose of the eminent domain action. In fact transfer to a private party may capture additional efficiencies that would benefit the community. *See Kelo*, 125 S. Ct. at 2666.

127. *See generally* Hird, *supra* note 106 (BRERA provides liability to purchasers that satisfy specific conditions. However, the relief is not absolute. Furthermore that relief does not extend to the liability that may be imposed by the Resource Conservation and Recovery Act).

128. *See* Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 477-78 (Mich. 1981).

129. *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 783 (Mich. 2004).

1. *Public Necessity*

Only where the action of the condemning authority is necessary to achieve the very existence of the enterprise can private property be taken and transferred to another private party.[130] A rail-line cannot exist between two cities unless all the properties along its path can be assembled. Thus the role of government land assembly to negate the likelihood of a holdout problem rises to a sufficient level of necessity.[131] Brownfield redevelopment is often a function of local necessity where the only land remaining for growth and redevelopment is contaminated.[132] It is not logical to expect the private market to acquire the contaminated parcel without certainty that it can recover its costs. Where cost recovery can only be achieved through assembly of collateral lands the necessity of public intervention rises to the level established by *Hathcock*.

The *Hathcock* court held the existence of similar uses that were able to develop without the assistance of eminent domain as evidence of the lack of necessity.[133] Accordingly, successful brownfield redevelopments accomplished by tax incentives, creative financing, or any means other than those proposed here, would seem to negate the need for eminent domain. However, unlike the shopping centers and office parks the *Hathcock* court referenced, the object here is relative to the land itself and not the improvements upon it. Although what the land use might yield in regard to jobs and taxes is also relevant here, it is not the sole justification for the condemnation.

2. *Accountability*

A condemned property may be transferred to another private party for redevelopment if that party remains accountable to the public.[134] Zoning and municipal regulation should not be enough to constitute sufficient accountability. Otherwise, there would be few if any properties that would fail to satisfy this element.[135] A

130. *See id.* at 781.
131. *See id.* at 781-82.
132. *See* U.S. CONFERENCE OF MAYORS, *supra* note 105, at 5-8.
133. *See Hathcock*, 684 N.W.2d at 783.
134. *See id.* at 782.
135. *See id.* at 786.

formal device is required assuring an enforceable right to compel use of the property consistent with the purpose for which it was taken.[136] Thus although the railroads were subject to considerable regulation, many of the transfers were also made with a reversionary clause if the land were no longer used as a railroad.

Similarly, brownfield redevelopment is subject to considerable regulation, but regulation alone should not be sufficient for accountability. However, transactions that include Activity and Use Limitations or covenants running with the land can likely establish the appropriate level of control. Because the focus here is on collateral takings to foster the redevelopment of the contaminated site, the takings and development would also progress in accordance with a redevelopment plan for all the land as a whole. Similar to the conditions in *Kelo,* the dispositions to private parties following condemnation could and should require enforceable agreements to execute the redevelopment in accordance with the plan.[137] Only where such conditions were included in the transfer would takings here meet this element.

3. *Independent Significance*

Where the property is selected because of facts of "independent public significance" rather than the interests of the private entity to which the property is eventually transferred, the public use requirement can be satisfied.[138] Because of the barriers to brownfield redevelopment and the availability of greenfield options, rarely will the private sector choose a brownfield site solely on its own interests.[139] Where the private market is redeveloping brownfield sites it is largely being swayed by the public sector with various forms of incentives.[140]

Moreover, one object of the redevelopment is to mitigate or

136. *See id.* at 784.

137. In *Kelo* the Court rejected the idea that the expected public benefits must be reasonably certain to occur, deferring instead to the determinations of the local government of what was necessary to effectuate the project. *See* 125 S. Ct. 2655, 2667-68 (2005).

138. Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455, 459-60 (Mich. 1981).

139. *See* BARTSCH ET AL., *supra* note 120, at 7-8.

140. *See* Lange & McNeil, *supra* note 2, at 110 (successful sites are more likely to have incentives available for the developer).

eliminate a threat to public health and safety and to return an underutilized parcel to active and efficient use. As such, just like blight removal, it is the location of the contaminated property that determines the land to be condemned.[141] Brownfield sites are identified by the nature of what lies in the ground and the need to remove those contaminants or the threat that they pose to the public health and redevelopment of the land. The collateral takings considered here are intended to aid in that redevelopment and in so doing mitigate the public health issue. These lands are identified by their ability to contribute to the redevelopment. Thus, they are selected by factors independent of any developer's interests.

IV. CONCLUSION

Each state is empowered to make its own determination regarding whether and how to limit economic development as a public purpose for the exercise of eminent domain. Michigan's decision in *Hathcock* is just one example, but offers reasonable limits on the condemnation power distilled from traditionally permitted takings. Under either the broad view of *Kelo* or narrow interpretation of *Hathcock*, collateral takings to foster the redevelopment of contaminated lands should satisfy the public use requirement to exercise the power of eminent domain. Given the significance of brownfield redevelopment to the health and vitality of American cities, the tool of eminent domain should not be taken away on the basis of a vague conception of economic development.

Despite the reality that municipalities are justly hesitant to acquire contaminated parcels,[142] legislatures should not tie the hands of local governments. Eminent domain should always be a last resort and the natural checks of transaction costs and political accountability reduce the risks of abuse.[143] In addition, when the specter of liability and stigma of contaminated land are introduced the likelihood of abuse is minimized. Given the significant role brownfield sites may play in the redevelopment of aging cities, it is important to ensure the tool is available when no other practical

141. *See Poletown*, 304 N.W.2d at 480.
142. *See* County of Wayne v. Hathcock, 684 N.W.2d 765, 783 (Mich. 2004).
143. *See* William Yardley, *The Court of Public Opinion Trumps Justice's Ruling*, PROVIDENCE J.-BULL., Nov. 21, 2005, at A1.

means exist. Although some states are permitting the acquisition of the contaminated land itself, the redevelopment of that land by itself is not likely to be feasible. In addition to real barriers raised by the presence of contamination, many brownfield sites are small functionally obsolete parcels in poor locations. Remediation may only be achievable through acquisition of additional lands.

In planning for the future of American cities, brownfield redevelopment is sound policy for the efficient use of resources, leveraging existing infrastructure, and mitigating the sprawling effects of greenfield development.[144] More importantly however, brownfield redevelopment is often the only option in the nation's aging cities struggling to adapt to changing economies and social structures that make new demands on limited land resources.

Many New England cities, for example, were built out long ago during the height of the industrial revolution. As the market shifted to the south these towns were left with deteriorating mill buildings and obsolete lands contaminated by the unregulated industry of the time. What once was a complex of mill buildings owned by a single corporation is now a combination of dozens of individually owned parcels of varying sizes.[145] Thus, there are many situations where existing models and rationales for eminent domain may be applied to assist an economic development effort involving a contaminated parcel.

The legislature is the proper body to decide in what situations eminent domain should be permitted. However, simply barring "economic development" and providing for an exception for the contaminated land itself ignores the realities facing the nation's aging cities. The Institute for Justice has proposed such model legislation in Connecticut.[146] That model statute should be amended to include an exemption that would allow for the type of remediation strategy discussed here.

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144. *See* EPA, *supra* note 102; *see also* ICMA, *Why Smart Growth: A Primer* 30 (1998), http://www.epa.gov/smartgrowth/pdf/WhySmartGrowth_bk.pdf.

145. *See* City of Lowell, Massachusetts, *Jackson Appleton Middlesex Urban Revitalization and Development Plan*, 55-56 (2000), *available at* http://www.lowellma.gov/depts/dpd/projects/jam.

146. *See* Institute for Justice, *IJ and Homeowners to Connecticut Legislators: Adopt Real Eminent Domain Reform,* Oct. 6, 2005, http://www.ij.org/private_property/connecticut/10_6_05pr.html. The proposed legislation is available at http://www.cga.ct.gov/jud/ProposedEminent.asp.

That amendment might read something like the following:

> Private property taken by eminent domain may be transferred or leased to private entities where a redevelopment plan demonstrates that the property is necessary to foster the redevelopment of other property which, by reason of environmental contamination, poses a threat to public health or safety in its present condition and where redevelopment of such property will be implemented in accordance with said plan.

Redeveloping contaminated land requires private market assistance, but where the nature of such properties erects barriers to private sector participation, the public sector should not be stripped of any tools that might remove those barriers. Where eminent domain may make redevelopment of contaminated land feasible, it should be allowed.

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